STATE OF MICHIGAN

COURT OF APPEALS

BRUCE SPRAGUE and
CINDY SPRAGUE,

Plaintiffs-Appellees,

v

KAREN M. BENEFIELD, DENNIS BENEFIELD, and SUSAN E. REHAK,

Defendants-Appellants.

UNPUBLISHED
March 16, 2001

No. 221953
Livingston Circuit Court
LC No. 98-016781-CZ

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting plaintiffs' motion for summary disposition. We affirm.

This case involves an independent action by plaintiffs, pursuant to MCR 2.612(C), to set aside a default judgment entered in 1995 in the case of *Benefield & Rehak v Homeowners Association Zukey Shores No. 1,* lower court file number 94-13634-CZ (the underlying action). The underlying action was a quiet title suit brought by the present defendants regarding a lake front lot designated as "Outlot B" in Zukey Shores No. 1, located in Livingston County.[1] The individual lot owners in the subdivision were neither made parties defendant in the action nor given notice of the complaint either by personal service or mailing. Instead, service of the complaint was attempted on the sole named defendant, Homeowners Association Zukey Shores No. 1 (the association), pursuant to substituted service by publication. After the association failed to answer the complaint or take other action as permitted by law, a judgment of default was entered in favor of the present defendants. The default judgment in the underlying action gave defendants ownership of Outlot B by adverse possession.

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[1] Zukey Shores No. 1 is a subdivision comprised of 33 lots, all of which, except for two lots, front Zukey Lake. Outlot B fronts Zukey Lake and is situated between the lots owned by defendants Benefield and defendant Rehak.

In the present case, the essence of plaintiffs' complaint is that defendants committed a fraud on the court in the quiet title action by failing to include the other lot owners of the Zukey subdivision, including plaintiffs, as parties and failing to provide proper notice to the lot owners. Plaintiffs allege that they and the other lot owners hold an interest in Outlot B pursuant to a dedication of the property for the benefit and common use of all lot owners in the subdivision. Plaintiffs further allege that the named defendant in the underlying action, the association, did not exist and held no interest in Outlot B.

The circuit court granted the present plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10). In so doing, the lower court ruled that (1) the dedication was effective – a recorded plat contained language that expressly dedicated the use of Outlot B to the common use of all the lot owners in the subdivision, (2) notice in the underlying action was effected by publication, (3) the order allowing notice by publication was based on the affidavit of defendants' previous attorney in the underlying action, (4) the names and addresses of at least two of the lot owners were known by defendants before the underlying suit was filed, and (5) the names and addresses of all of the lot owners in the subdivision were available through examination of the tax rolls. The Honorable Stanley J. Latreille concluded:

> I will make the further finding that the affidavit [of defendants' previous attorney] upon which it [the order for substitute service] was based was so sketchy, so lacking in information, and really misleading in light of what we know to be the facts that it was tantamount to fraud and effectively fraudulent in the sense that it mislead [sic] the Court into believing that all proper and easily available or readily available avenues of inquiry had been explored when in fact that was not the case.

Citing fraud on the court, Judge Latreille set aside the default judgment pursuant to MCR 2.612(C)(3). As a result of the circuit court's order granting summary disposition and setting aside the default judgment, title to the property reverted to the owners of record as established before the entry of the default judgment.

On appeal, defendants argue the trial court erred in granting plaintiffs' motion for summary disposition and setting aside the default judgment. The essence of defendants' argument is that although defendants' attorney in the underlying action may have been incorrect in his conclusion that legal interests in the property were not created in the lot owners, there was no evidence of fraudulent intent on the part of the attorney when he submitted the affidavit to obtain substitute service on the association. Defendants do not dispute the factual basis of the lower court's ruling; rather, they disagree with the trial court's conclusion that the manner in which they obtained the default judgment constituted a fraud on the court. Because the trial court's factual assumptions, specifically its conclusion that the platted dedication was effective, have not been challenged by the parties to this appeal, we proceed with our analysis accepting that plaintiffs are interested parties in quiet title proceedings involving Outlot B.

This Court reviews rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). A trial court "may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to

judgment as a matter of law." *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed "in the light most favorable to the party opposing the motion." *Id*. See also *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The decision to set aside a default judgment is reviewed for an abuse of discretion. *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 294; 416 NW2d 415 (1987).

MCR 2.603(D)(3) provides that a "court may set aside an entry of default and a judgment by default in accordance with MCR 2.612." MCR 2.612(C)(3) provides:

> This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

In the context of MCR 2.612(C)(3), a fraud is perpetrated on the court where some material fact is concealed from the court or some material misrepresentation is made to the court. *Matley v Matley (On Remand)*, 242 Mich App 100, 101; 617 NW2d 718 (2000); *MacArthur v Miltich*, 110 Mich App 389, 391; 313 NW2d 297 (1981). Depriving a party in interest of his or her rights in a pending cause of action operates as a fraud on that person,[2] and failure to advise the court of the true situation so that arrangements might be taken to give the party his or her day in court operates as a fraud on the court. *Moody v Carnegie*, 356 Mich 434, 442; 97 NW2d 46 (1959). In *Moody*, our Supreme Court recognized the power of a court of equity to grant a rehearing and set aside an improperly entered decree in order to relieve a party of fraud. In that case, a quiet title action, the trial court ordered a rehearing where it was shown that the owner of the property in question was not notified of a hearing affecting her rights in the property. The record indicated that in addition to the plaintiff's own attorneys not advising her of the hearing date, the defendants had not made an earnest effort to discover her identity as true owner for purposes of serving her with the statutory notice required for them to purchase the property under a tax sale. An equally divided Supreme Court affirmed the trial court's determination that the failure of the defendants to advise the court that they had not actually served the true owner or, for that matter, the prior owner (who would most likely have contacted its successor in interest), constituted a fraud on the court:

> Defendants have appealed from the decree entered, claiming that the trial court had no jurisdiction to grant the rehearing, and in any event that he abused his discretion in so doing. Emphasis is placed on the failure of the trial judge to specifically find that defendant William Carnegie was guilty of fraud. It is apparent, however, that in granting the petition the judge was convinced from the

[2] Moreover, in *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950), the United States Supreme Court held that notice, reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to defend, is a fundamental and elementary requirement of due process in any action which is to be accorded finality. US Const, Am XIV.

showing made that the rights of plaintiff had not been properly protected. It may be noted in this connection that on the first hearing defendant William Carnegie, called for cross-examination under the statute, stated that he had contacted the Briggs Commercial & Development Company for the purpose of inquiring if that corporation was still the owner of the lot. He was advised that the property had been sold, and that it would be necessary to check records to determine the purchaser or purchasers. Defendant did not further pursue the inquiry, but did check the records in the office of the county treasurer, which apparently indicated that the lot had been assessed to A. Moody. It is a fair inference that the notice of the tax sale and amount necessary for redemption was prepared in reliance on the treasurer's record. That defendant did not make an earnest effort to discover the then owner, or the residence thereof, is evident. Neither did he cause service to be made on the Briggs Commercial & Development Company which was at the time the owner of record. Had he done so, it is quite probable that the corporation would have endeavored to contact its successor in title.

* * *

Depriving plaintiff of her rights to have her cause of action properly presented to the court through her own testimony operated as a fraud on her. Failure to advise the trial judge of the true situation to the end that arrangements might be taken to obtain her testimony was a *fraud on the court whose duty it was to see that justice in the cause was properly administered. It is no answer to the situation presented to say that defendants are not shown to have been parties to the fraudulent conduct in question, nor are we concerned at this time with the reasons for the failure of those who owed plaintiff the duty to advise that the case was set for trial, and that she should be prepared to testify, to observe such duty. Regardless of motives, the result was not in accord with her just rights. The consequences must fall on defendants to the extent of precluding them from profiting as a result of the failure to inform plaintiff, and the trial judge, of facts that both were entitled to know.* On discovering the true situation as set forth in the uncontroverted sworn statements of the plaintiff in her application for relief the trial judge proceeded to remedy the injustice that had been done in the only effective way that was open to him. [*Id.* at 437-438, 441-442 (emphasis added).]

Thus, a fraud on the court may arise where there has been a corruption of the impartial functions of a court due to an intentional or unintentional material misrepresentation by a party. [3]

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[3] See also *Adair v Cummins*, 48 Mich 375, 382-383; 12 NW 495 (1882), in which the Court, addressing a disproportionate division of property by court-appointed commissioners in a partition case, stated,

> [I]t is not the meaning of the court that the commissioners were really actuated by a specific and sedate design to perpetrate a cheat. But the view is that they fully intended to act precisely as they did, and that whatever notion was in

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A situation analogous to that in *Moody* exists in the present case, and we can conclude with relative certainty, as the *Moody* Court did, that "[h]ad the trial judge been advised that plaintiff had not been notified of the hearing and given an opportunity to be present and testify in her own behalf, it is quite probable that the decree dismissing the case would not have been made." *Id*. at 439.

MCR 3.411(B)(2)(b), applicable to civil actions to determine interests in land, provides that "[t]he complaint must allege . . . the interest the defendant claims in the premises[.]" Further, MCL 600.2932(1); MSA 27A.2932(1) provides:

> Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other *person who claims or might claim any interest* inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not. [Emphasis added.]

MCR 2.205(A) mandates that

> Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

The affidavit of defendants' attorney submitted to the court in the underlying action in order to procure alternate service of process by publication on the association stated:

> I . . . being duly sworn deposeth and say that diligent inquiry has been made of the public record and the individuals most likely to have knowledge regarding the Defendant and service of process has been unable to be effectuated.

Admitting on appeal that "[p]erhaps [their attorney] was ultimately incorrect in his 'legal' assessment of who was the 'interested party,' " defendants nonetheless argue that a fraud on the court based on the above affidavit did not occur because the attorney did in fact make inquiry concerning "Homeowners Association Zukey Shores No. 1" and it is a fact that no such entity could be personally served.[4] This logic is myopic and ignores the heart of the matter – the simple inquiries that were not, but should have been, made by defendants to ensure the inclusion of all interested parties in the quiet title suit and divulged to the trial court to allow for the proper and complete disposition of the action.

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> point of fact in their minds the court in judging of the proceeding in reference to its quality in equity is bound to construe it as fraudulent.

[4] Indeed, plaintiffs maintain that the association does not even exist, and no proofs to the contrary have been advanced by defendants.

The record indicates that in the underlying action, defendants searched through various public records but were unable to locate the association, the entity they presumed to be the interested party defendant in the quiet title action. Despite the failure to locate the association or garner a response from it following issuance of the ex parte order allowing service of process by publication, defendants proceeded with their cause of action against the association alone, culminating in the default judgment. However, as the trial court noted, the interests of all the subdivision property owners, including plaintiffs, in Outlot B were readily ascertainable from a review of the tax rolls, and the names and addresses of at least two of the lot owners were known by defendants before the underlying suit was filed. Moreover, a recorded plat contained language that expressly dedicated the use of outlot B for all the owners in the subdivision. This information, critical to the legitimacy of defendants' action to quiet title, see MCR 3.411(B)(2)(b), MCL 600.2932(1); MSA 27A.2932(1), and MCR 2.205(A), *supra*, was a matter of public record that was never properly explored by defendants before filing their motion for a default judgment against the nonexistent homeowners association. Plaintiffs and the subdivision lot owners should have been named as parties in the underlying action and were entitled to service of process pursuant to MCR 2.105(A), not service by publication, unless there was a showing that service could not be effected.

We therefore agree with the circuit court's ruling that defendants misled the court in the underlying action into believing that all proper and readily available avenues of inquiry into affected property interests had been explored when in fact that was not the case. As in *Moody*, *supra* at 437, defendants failed to make an "earnest effort" to determine ownership rights in Outlot B. Whether intentional or otherwise, defendants failed to disclose the material fact that plaintiffs and the other lot owners had an interest in the property on the basis of the dedication and should have been named as party defendants in the action to quiet title. Conversely, a material fact was misrepresented to the court -- that the association was the proper and only defendant. There is little doubt from the record before us that had the court been aware of plaintiffs' interest in the quiet title action, the default judgment would not have been issued. Reiterating the *Moody* Court's observations, "[r]egardless of motives, the result was not in accord with [the plaintiff's] just rights. The consequences must fall on defendants to the extent of precluding them from profiting as a result of the failure to inform plaintiff, and the trial judge, of facts that both were entitled to know." *Id*. at 442.

In the absence of a genuine issue of material fact that defendants failed to effect personal service or service of process by mail on plaintiffs as interested parties in the underlying action, the lower court did not err in granting summary disposition pursuant to MCR 2.116(C)(10). In this regard, we hold that Judge Latreille did not abuse his discretion in ruling that a material misrepresentation was made with regard to the proper parties in the underlying action, which warranted setting aside the default judgment to avoid an injustice.

Defendants next contend the trial court abused its discretion in failing to hold an evidentiary hearing to determine whether there was fraud on the court.[5] Because plaintiffs'

[5] Plaintiffs claim that defendants failed to preserve this issue for appeal. Although defendants did not make a request for an evidentiary hearing, we hold that the issue is preserved because of (continued…)

action was based on fraud on the court, defendants' argument is that summary disposition should not have been granted pursuant to MCR 2.116(C)(10), and a trial should have taken place. We have already concluded, as a matter of law, that based on undisputed facts summary disposition was properly granted to plaintiffs pursuant to MCR 2.116(C)(10); therefore, no trial was necessary on the issue of fraud on the court and the trial court did not abuse its discretion in this regard. *Rapaport v Rapaport*, 185 Mich App 12, 16; 460 NW2d 588 (1990).

In any event, an evidentiary hearing was not mandated under the circumstances. MCR 2.119(E)(2) provides that "[w]hen a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or *may* direct that the motion be heard wholly or partly on oral testimony or deposition." (Emphasis added.) Relying on MCR 2.119(E)(2), this Court in *Williams v Williams*, 214 Mich App 391, 399-400; 542 NW2d 892 (1995), held that an evidentiary hearing was not required on the issue whether a fraud on the court occurred, stating:

> While recognizing that the level of proof relating to allegations of fraud is "of the highest order," we believe that the trial court itself is best equipped to decide whether the positions of the parties . . . mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which "swearing contests" between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing.

Finally, defendants argue that plaintiffs did not own any property in the subdivision at the time the underlying suit was filed and service attempted; therefore, plaintiffs lack standing in the present case to set aside the judgment.[6] Questions of law are reviewed de novo. *Franklin*

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the nature of the summary disposition motion. Plaintiffs' action to set aside the default judgment was based on an allegation of fraud on the court, and plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that there was no genuine issue of fact that fraud on the court occurred and that the default judgment should be set aside; therefore, a trial on the issue was unnecessary. By defendants simply challenging the (C)(10) motion, which they did, defendants were essentially arguing that a trial or evidentiary hearing was necessary because there were issues of fact. Therefore, the issue has been preserved for appeal.

[6] Plaintiffs argue that defendants waived any claim based on lack of standing pursuant to MCR 2.116(D)(2). Although plaintiffs do not specify, we assume plaintiffs are claiming that the lack of standing defense falls under MCR 2.116(C)(5), which provides for summary disposition where "[t]he party asserting the claim lacks the legal capacity to sue." In *Leite v Dow Chemical*

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Historic Dist Study Committee v Village of Franklin, 241 Mich App 184, 187; 614 NW2d 703 (2000).

MCR 2.201(B) provides that "[a]n action must be prosecuted in the name of the real party in interest[.]" As explained by this Court in *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997):

> In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Solomon v Lewis*, 184 Mich App 819, 822; 459 NW2d 505 (1990). In *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992), the Supreme Court, quoting 59 Am Jur 2d, Parties, § 30, p 414, noted that
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> "[o]ne cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as 'standing.'"

Plaintiffs have an interest in a lot located in the subdivision that gives plaintiffs an interest in the property at issue. Accordingly, plaintiffs' interest will be jeopardized if the default judgment is not set aside. Defendants cite no authority to support their proposition that a court must look at a person's standing at the time of the original action to determine standing at the time an action is undertaken to set aside a judgment. Parties may not leave it to this Court to search for authority in support of their position. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

Defendants' argument does not allow an injured party redress, but would potentially allow redress for a past owner who now does not own any lot in the subdivision. We note that MCR 3.411(H) provides that a judgment determining an interest in land only determines the rights of parties involved in the action. Because plaintiffs and the other lot owners were never made parties in the underlying action, their rights in the property were not determined, and the lot owners, including plaintiffs, would have standing to file a quiet title action regarding the property. Without setting aside the default judgment, there would exist, and did exist, two competing legal interests in the property. Defendants still have the opportunity to proceed with the action to quiet title based on adverse possession.

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Co, 439 Mich 920; 478 NW2d 892 (1992), our Supreme Court held that a defense based on a claim that a party was not a real party in interest (standing) is not the same as a claim that a party lacked the legal capacity to sue. The Court further held that a motion for summary disposition based on the real party in interest defense should be brought pursuant to MCR 2.116(C)(8) or (10) based on the pleadings or other circumstances of the particular case. *Id.* A (C)(8) or (C)(10) motion may be brought at any time pursuant to MCR 2.116(D)(3). Therefore, plaintiffs' argument that defendants waived the defense lacks merit.

Defendants' argument that plaintiffs were bound by the inaction of their predecessors in interest and could not bootstrap to acquire standing lacks merit. The inaction of plaintiffs' predecessors in interest was caused by defendants' failure to properly identify the parties in interest and give proper notice pursuant to MCR 2.105(A). Plaintiffs had a personal stake in setting aside the judgment at the time their complaint was filed; therefore, they had standing, and the trial court did not err in granting plaintiffs' motion for summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins